

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

| | |
|--|---------------------|
| IN RE: MIDAMERICAN ENERGY COMPANY | DOCKET NO. DRU-02-1 |
|--|---------------------|

DECLARATORY ORDER

(Issued March 11, 2002)

PROCEDURAL BACKGROUND

On January 11, 2002, MidAmerican Energy Company (MidAmerican) filed a petition with the Utilities Board (Board) requesting a declaratory order concerning MidAmerican's Gas Tariff No. 1, 3rd Revised Sheet No. 16 (Sheet No. 16), effective February 28, 2001, and Electric Tariff No. 1, 1st Revised Sheet No. 21 (Sheet No. 21), effective January 2, 1998. The proceeding has been identified as Docket No. DRU-02-1. The petition was filed pursuant to the provisions of Iowa Code § 17A.9 and Board rule 199 IAC 4.1. The specific fact situation on which MidAmerican is requesting the declaratory ruling involves a potential conflict between MidAmerican's tariff Sheet No. 16 and Sheet No. 21 and 199 IAC 19.4(15)"e" and "h," 19. 4(16)"a," 20.4(15)"e" and "h," and 20.4(16)"a."

The facts to be considered are:

1. A landlord has had service at a rental property and the landlord is delinquent in the payment of service from MidAmerican at that premise.

2. The premise currently does not have service or is disconnected for nonpayment shortly thereafter.

3. A tenant moves into the premise and requests service from MidAmerican.

4. MidAmerican refuses service to the tenant (applicant) based upon the outstanding debt of the landlord at that premise.

Gas tariff Sheet No. 16 and electric tariff Sheet No. 21 provide that MidAmerican may refuse or disconnect service with appropriate notice "if the premises has an outstanding debt and the person responsible for the outstanding debt owns, occupies, or receives the benefit of the service provided at that location."

Subparagraphs 199 IAC 19.4(16)"a" and 20.4(16)"a" contain identical provisions that provide:

19.4(16) *Insufficient reasons for denying service.* The following shall not constitute sufficient cause for refusal of service to a present or prospective customer:
a. Delinquency in payment for service by a previous occupant of the premises to be served.

The question raised by MidAmerican is the continued viability of its Board-approved tariff in light of the position taken by Board staff that the tariff must be amended to remove a perceived conflict with 199 IAC 19.4(16)"a" and 20.4(16)"a." MidAmerican states that it understands this question arises in the context of an applicant for service at a rental property being denied service because the landlord has a past-due debt at the premise. MidAmerican submits that the continued viability of tariff language in Sheet No. 16 and Sheet No. 21 should be affirmed.

The Board by order issued January 17, 2002, gave notice of the request for declaratory order and set the matter for specified proceedings, including an intervention and response date, and a date for objections and replies. On February 6, 2002, the Board issued an additional order giving time for objections and replies to applications to intervene and responses of Iowa Coalition of Housing and the Homeless (ICHH), Iowa Community Action Association (ICAA), and granting intervention to the Consumer Advocate Division of the Department of Justice (Consumer Advocate), Legal Services Corporation of Iowa (Legal Services), Peoples Natural Gas Company, Division of UtiliCorp United Inc. (Peoples), Iowa Association of Electric Cooperatives (IAEC), and Iowa Association Municipal Utilities (IAMU).

Responses were filed by Consumer Advocate, Legal Services, IACC, and ICHH in opposition to the validity of the provisions in MidAmerican tariff sheets No. 16 and 21. IAEC and IAMU filed in support of the provisions in the tariff sheets. Peoples stated that it was taking no position on the narrow question concerning the tariff provisions presented by MidAmerican. Peoples states further that it does not agree to be bound by the ruling in this proceeding. Consumer Advocate filed a supplemental pleading indicating that it would be bound by the Board's determination after any judicial review has been completed.

On February 15, 2002, the Board issued an order granting intervention to IACC and ICHH. In the order, the Board granted the parties the opportunity to file briefs. Legal Services and MidAmerican filed briefs in support of their respective positions.

PARTIES' POSITIONS

MidAmerican tariff sheets 16 and 21 provide that MidAmerican can refuse or disconnect service, with appropriate notice, if the premises has an outstanding debt and the person responsible for the outstanding debt owns, occupies, or receives benefit of the service provided at that location. The tariff sheets were approved by the Board in Docket No. RPU-95-15 (TF-95-462, TF-95-463).

MidAmerican states that the only scenario that gives rise to a question concerning the tariff language is when an applicant for service at a rental property is denied service due to the past-due amount owed by the landlord/owner for service to that property. MidAmerican has then suggested that since the Board has listed in its rules insufficient reasons for denying or refusing service and that list includes "[d]elinquency in payment by a previous occupant of the premises to be served" but does not mention a debt owed by the landlord/owner, the provisions of the tariff are not in conflict with the rules. This is the legal maxim of "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of another.) The rule MidAmerican concludes does not preclude the denial or refusal of service for a landlord/owner's debt. The landlord/owner according to MidAmerican would benefit from the service since gas and electric service is essential to the preservation of the premises according to MidAmerican. MidAmerican references its policy that allows a landlord/owner to have service switched to the landlord/owner's account when a tenant is disconnected to demonstrate that service is a benefit to the property.

MidAmerican has also suggested that the tenant who is refused service in this situation should utilize the provisions of Iowa Code § 562A.15 that require a landlord/owner to make repairs and do whatever is necessary to put and keep premises in a fit and habitable condition and to supply running water and reasonable amounts of hot water at all times and reasonable heat for redress. MidAmerican does agree that there is an exception to the requirements of this statute where the building that includes the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct utility connection.

IAMU and IAEC state that the benefit of service concept at issue in this proceeding is a policy followed by their member utilities in varying degrees. IAMU supports MidAmerican's position and suggest that it allows collection of the debt rather than shifting the debt to other ratepayers as an uncollectable account. IAEC suggests that the rules should be interpreted to allow the refusal of service to a location in those instances where an outstanding debt for service to the location exists and the individual or entity responsible for paying the debt will benefit from the reconnection and, since MidAmerican contends that the landlord/owner would benefit from reconnection, service can be denied to the tenant. IAEC states, the issue involving who benefits from the reconnection arises where multiple occupants reside at a single premise as well as in the landlord-tenant situation.

Legal Services takes the position that the tariff language is not consistent with the Board's rules and should be found to be overly broad and unlawful. Legal

Services argues that the lists in 19.4(16) and 20.4(16) are not exclusive just as the lists in 19.4(15) and 20.4(15) are not exclusive for reasons that service may be refused or disconnected.

Legal Services points out the exception in Iowa Code § 562A.15 for premises that are constructed to receive utility service separately and suggests that the utility is in a better position to seek legal redress for the unpaid bill than is the tenant for the violation of the landlord-tenant statute. Legal Services contends that since the Board's rules do not specifically address the instant situation, MidAmerican is bound by the provisions of Iowa Code §§ 476.3(1) and 476.8 to furnish reasonably adequate service and facilities.

Legal Services challenges the concept that a utility may deny service to a person based upon the "benefit" some other person may have received from the utility service. Legal Services argues that the debt runs with the person and not the premises and that MidAmerican's interpretation of the tariff provisions is excessively broad and could include situations that are unreasonable.

Consumer Advocate contends that MidAmerican has narrowly construed the term "previous occupant" and that the term should include "owner-occupants" as well as "tenant-occupants." Consumer Advocate argues that adopting MidAmerican's interpretation in effect requires the applicant requesting service to satisfy the debt of another, here the landlord/owner, as a condition of receiving service, which violates the conventional rule that the liability for utility debt of another cannot be imposed in

the absence of special agreement or statutory authorization. Consumer Advocate cites decisions from other jurisdictions to support this position.

ICHH and ICAA take the position that when utility service is denied to a tenant on the basis of a landlord debt, it reduces the availability of affordable housing to low-income citizens. They suggest that there are remedies for collecting bad debts other than denying service to a qualified tenant.

MidAmerican filed a reply to the responses of the other parties. In that reply MidAmerican states that the tariffs were approved by Board order, as were the Board's rules and both are valid. MidAmerican references Docket No. DRU-90-2, which involved the question of a landlord asking that service be disconnected to rental property where a resident was protected by the winter moratorium.

MidAmerican points out that Consumer Advocate took the position that Iowa Code § 562A.15 applied to the landlord's obligations. The Board held in that case that the resident could not be disconnected until after April 1 and that the landlord was responsible for the service and had a remedy under the landlord-tenant law.

MidAmerican then asserts that the issue is the same here and the landlord must pay the debt for utility service in order to rent the property.

MidAmerican states that 19.4(15)"e" and 20.4(15)"e" cover the situation where the landlord is delinquent and a new tenant seeks service. MidAmerican then states that disconnection and the threat of disconnection are "powerful collection tools" for utilities and these tools would be vitiated if the rental property owner could retain the benefits of gas and electric service by renting the property to another person.

MidAmerican suggests that this would be preferential treatment for rental property owners, since homeowners do not have this option for continuing service to the property.

Finally, MidAmerican states that it is not attempting to impose liability beyond that which would be available under common law and contract. MidAmerican points out that it is not free to select its customers, and the question to be decided is whether it retains the right to refuse to continue providing service to property when the owner of the property has a debt for service at that property. MidAmerican then argues that the term "occupant" is being used by the Board to describe one who resides and does not include an owner who does not also reside at the property.

In its brief, MidAmerican argues that the landlord is required by statute to provide habitable premises to a tenant and providing gas and electric service is part of the requirement for a premise to be habitable. Thus, MidAmerican asserts, the landlord must pay his utility bill to meet this statutory obligation.

MidAmerican then argues that gas and electric service is necessary to preserve the value of the premise. MidAmerican references the bankruptcy laws that require utility service to be maintained for property in a bankruptcy estate.

MidAmerican asserts that requiring payment of the landlord's debt is the most cost-effective method of collection and reduces the overall costs carried by all ratepayers. Additionally, MidAmerican asserts that it must enforce its approved tariffs, and the tariff sheets in question have been in effect for five years and in a similar case involving an informal complaint, the Board upheld MidAmerican's

interpretation of the tariff. In that case MidAmerican points out the Board found there was no conflict between the Board's rules and the language in the tariff sheets.

Legal Services, in its brief, argues that MidAmerican's tariff is overbroad and purports to impose liability for debts without any contractual or common law basis. Legal Services argues that MidAmerican is limited to refusing service only for remedies against the customer who owes the debt and not against other unrelated persons. Legal Services argues further that the debt of the landlord is a collateral matter unrelated to the service of the tenant. This, Legal Services argues, is contrary to the general policy and court decisions in other jurisdictions that as a matter of public policy a utility cannot deny service, which it is authorized to furnish because of a collateral matter.

Legal Services then asserts that the tenant in this scenario has not violated a company rule by applying for service at a premise where a landlord owes a debt. The rule violation would be the landlord's and not the tenant's. Legal Services asserts that the availability of other remedies to the tenant does not justify MidAmerican's action and the reliance on the landlord-tenant statute is misplaced since the statute provides a specific exception for premises that provide for separate utility service.

Finally, Legal Services claims that MidAmerican's reliance on the common law rule of statutory interpretation "expressio unius est exclusion alterius" is unfounded. Legal Services points out that the Board also has rules listing sufficient reasons for refusing service. Neither of the lists provides for the refusal of service where the

landlord/owner is delinquent in payment for service and so the maxim does not apply. If the maxim applied, Legal Services argues, MidAmerican could not refuse service since a landlord/owner debt is not one of the listed reasons for refusing service.

BOARD DECISION

The Board has reviewed the positions presented by the parties and the legal citations, tariff provisions, and Board rules that are related to the question before the Board. The fundamental issue is whether the tariff is in conflict with Board rules and whether the tariff language can be interpreted to be consistent with Board rules. Since the Board approved the tariffs and adopted the rules, both are presumed to be valid. The rules though take legal precedence over the tariffs. In this scenario, the Board finds that the tariff language in question cannot be interpreted to be consistent with Board rules and therefore violates those rules.

In the specific fact situation presented by MidAmerican, a landlord/owner has incurred a debt for utility service at rental property and is delinquent in payment for the service. The rental property has had its service disconnected by MidAmerican. The landlord/owner then rents the property to a tenant who requests service from MidAmerican at the property. MidAmerican refuses service citing the delinquent debt of the landlord/owner. Under the scenario presented by MidAmerican, the landlord/owner did not previously occupy of the premises.

Board subrules 199 IAC 19.4(15) and 20.4(15) address the requirements for a utility to refuse or disconnect service to a customer. These subrules provide for notice to the customer of any pending disconnection and then the subrules describe

under what circumstances service to a customer may be refused or disconnected. Paragraphs 19.4(15)"e," 19.4(15)"h," 20.4(15)"e," and 20.4(15)"h" provide for refusal or disconnection for a violation of or noncompliance with the utility's rules on file with the Board and for nonpayment of a bill or deposit, except as restricted by 19.4(16) and 20.4(16). Subrules 19.4(16) and 20.4(16) list reasons that are insufficient for disconnecting or refusing service. Paragraphs 19.4(16)"a" and 20.4(16)"a," the relevant paragraphs for this discussion, provide that delinquency in payment for service by a previous occupant of the premises to be served is an insufficient reason to refuse service to an applicant for service at that location. All of the provisions described concerning disconnection and refusal of service are related to the individual customer or an applicant for service who may become a customer.

The specific language in MidAmerican's tariffs that is the subject of this declaratory ruling provides that the company may refuse or disconnect service with appropriate notice if the premises in question has an outstanding debt and the person responsible for the outstanding debt owns, occupies, or receives the benefit of the service provided at that location. MidAmerican has limited its request for declaratory ruling to just this provision.

Although MidAmerican has raised the application of Iowa Code § 562A, the landlord-tenant statute, to the fact situation in this docket, the Board finds the provisions of Iowa Code § 562A.15 are not controlling or an adequate alternative for a person who is seeking service from a public utility. An applicant for service should not have to take legal action against a landlord/owner in order to obtain service. It is

also not the responsibility of an applicant for utility service to help MidAmerican collect past due bills. In addition, there is the specific exception in the statute for premises that have a separate utility connection for the tenant.

Under the provisions of chapter 476, service by a public utility is subject to the Board's jurisdiction and to the rules adopted by the Board. The basic policy is that service from a public utility is available to anyone who otherwise qualifies and those circumstances where service can be denied should be strictly construed. The Board's rules address the refusal and disconnection of service to a customer or applicant for service. The rules allow refusal and disconnection of service where the customer has an outstanding debt and they state specifically that the debt of a previous occupant is an insufficient reason to refuse or disconnect service.

The tariff language in MidAmerican's tariff is not consistent with Board rules discussed above. The tariff provision attaches the debt of the landlord/owner to the premises and would thereby allow MidAmerican to refuse or disconnect service for a debt at the premises rather than one owed by the person who is applying for service. The tariff goes beyond the reasonable application of the Board's rules and creates the unreasonable situation where MidAmerican can block occupancy of a premise and service to a customer based upon the a debt of a previous occupant or as here the landlord/owner. In addition, this places a restriction on a tenant requesting utility service that would not be placed on an owner of a residence. The owner of the residence would not be refused service for the debt of a previous owner.

The Board finds that the Iowa Supreme Court decision in Berner v. Interstate Power Company, 57 N.W.2d 55 (Iowa 1953) provides some guidance in the scenario presented. The Berner case involved an action for damages for disconnection of service by the utility at a customer's residence for non-payment of a utility bill at the customer's business location. Id at 57 N.W.2d 56. The company had a rule that allowed it to disconnect the customer at one location for a debt at another location.

The court held that it was well settled that a public utility has the power, except where otherwise regulated by statute, to prescribe and adopt reasonable rules and regulations. The court then said that the utility may have a rule that service may be refused at a new address to a customer, who is delinquent at a former address, or it can disconnect a customer at a given address for a delinquent payment at that address, or it can require a deposit to ensure payment. The court continued by stating that the utility does not have the right, as does an ordinary business, to accept or reject patrons. The court then recognized that it would be a hardship to require the utility to be forced to collect the many small accounts that it administered through the normal collection process. The court held that balancing the necessity that people of a community be furnished with service against the right of the utility for fair compensation was necessary, and the utility must serve all who agree to and do observe reasonable rules and regulations. Id at 57 N.W. 2d 47.

The court then held that "Water and light are indispensable and companies engaged in supplying such commodities undertake to do so to all applying and complying with reasonable rules and regulations. Such companies have no right to

withhold such service for the purpose of enforcing the payment of past-due indebtednesses, unless such indebtedness is incurred for the current use of the same upon the premises supplied." Finally, the court held that if the rule is to the effect that the company may discontinue service at an address which is the homestead at which there is no arrearage for service furnished, because said consumer refuses to pay for past-due service for some other and independent use, or at some other place, such rule is unreasonable as exacting from customers something to which it was not entitled under the law. Id.

The analysis in Berner is applicable to the scenario presented by MidAmerican. In fact, the scenario goes beyond Berner and would allow MidAmerican to refuse service to a customer for the debt of another person and attaches the debt to a location rather than to the customer. Under Berner, a customer cannot be held liable for a debt from another independent use. Although not exactly the same fact situation, the holding applies to this declaratory ruling.

The United States Supreme Court decision in Memphis Light, Gas & Water v. Craft, 436 U.S. 1, 56 L.Ed. 2d 30, 98 S.Ct 1554 (1978), was addressed by both MidAmerican and Legal Services. The Board finds the case is not applicable to this scenario. In that case, the issue was whether the municipal utility was required under the Fourteenth Amendment to allow the customers to complain to the utility before it disconnected them. The case involved due process afforded by a governmental body.

The Board is not presented in this docket with the question of who is an "occupant" of the property for purposes of determining when service can be refused or disconnected where a person who is not the customer of record or a previous customer is residing at the premises to be served. The fact situation before the Board is limited to a landlord/owner who was not a previous occupant and is not a current occupant. The Board is aware that there are situations involving multiple occupants who are not the customer of record and who then attempt to obtain service at the same or other locations when the customer of record has an outstanding debt. The Board is not addressing those situations in this declaratory ruling.

Finally, MidAmerican states that the threat of disconnection and refusal of service are "powerful collection tools." The Board recognizes that these are powerful tools and finds the use of these tools should be strictly limited to those situations where the Board has indicated by rule that they may be used. Otherwise if these tools are subject to the discretion of a public utility, they can be abused or applied in an inconsistent manner.

DECLARATORY ORDER

The Board concludes that MidAmerican's Gas Tariff No. 1, 3rd Revised Sheet No. 16 (Sheet No. 16), and Electric Tariff No. 1, 1st Revised Sheet No. 21 (Sheet No. 21) violate Board subrules 199 IAC 19.4(15)"e" and "h," and 20.4(15) "e" and "h" in that the tariff sheets provide for refusal and disconnection of service where "the premises has an outstanding debt and the person responsible for the outstanding debt owns, occupies, or receives the benefit of the service provided at that location."

The rules provide when service may be refused or disconnected to a customer and not for a debt attached to a premise at which service is requested as provided for in the tariff sheets. MidAmerican's request to have the validity of the specific tariff sheets upheld is denied.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. A declaratory order as described in the paragraph above is issued in response to the petition filed by MidAmerican Energy Company on January 11, 2002.
2. MidAmerican Energy Company shall file a proposed revised tariff Sheet No. 16 (gas) and Sheet No. 21 (electric) in compliance with this order, on or before April 11, 2002.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 11th day of March, 2002.